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Jessica Rotiford
Mil. Pers.

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-187581

DATE: January 6, 1977

MATTER OF: Mrs. Donalds Frazier, guardian

DIGEST: Claim of ex-wife guardian of minor children of deceased member for 6 months' death gratuity may not be allowed since records show that member remarried and was apparently survived by spouse who, although she never filed claim and has not been located, is the only eligible beneficiary under 10 U.S.C. 1477(a)(1) (1970). However, if guardian can show that member had no spouse on date of death, or that his spouse died before her claim was barred (31 U.S.C. 71a (Supp. V, 1975)), then further consideration is to be given the guardian's claim.

This action is in response to a letter from Mrs. Donalds Frazier, addressed to Senator Henry M. Jackson, received by him on August 24, 1976, and forwarded to our Office for reply, concerning Mrs. Frazier's entitlement to receive, as guardian, the 6 months' death gratuity due in the case of the late Staff Sergeant Donald James, Jr., USAF, SSAN 316-26-3467, who died August 17, 1969. That letter, in effect, constitutes an appeal from a settlement dated July 26, 1972, by the Transportation and Claims Division of this Office (now Claims Division), disallowing Mrs. Frazier's claim on behalf of the minor children of the deceased member for the reason that they did not qualify as the living survivor highest on the list contained in the provisions of law governing payment of the gratuity (10 U.S.C. 1477(a) (1970)).

The record shows that the member and Mrs. Frazier were married and that two children were born of that union. It shows further that Donalds Frazier was

B-187581

divorced from the member on January 5, 1968, and was awarded the custody of their two children. Following the member's death, a marriage certificate was found among his effects which showed that he married a woman named Judi Kaye on March 23, 1968.

The record also shows that the Air Force has neither received a claim for the death gratuity from Judi Kaye nor has it been able to locate her. In the meantime (June 1972), Mrs. Frazier submitted a claim for the death gratuity as the legal guardian of her two sons.

Payment of the 6 months' death gratuity is governed by 10 U.S.C. 1477 (1970), which provides in part:

"(a) A death gratuity payable upon the death of a person covered by section 1475 or 1476 of this title shall be paid to or for the living survivor highest on the following list:

"(1) His surviving spouse.

"(2) His children, as prescribed by subsection (b), in equal shares."

Based on those provisions, the Claims Division determined that Judi James was the eligible beneficiary for the payment of the 6 months' death gratuity as the member's surviving spouse. Although the Claims Division noted Judi James' absence, Mrs. Frazier's claim was denied on the basis that in order to protect the interest of the Government, it had to proceed on the assumption that the member's spouse was alive until the fact of her death was established or judicially determined by a court of competent jurisdiction. See in this connection, B-136723, September 11, 1956.

B-187581

There is nothing of record to show that Judi James was not married to the member at the date of his death, or that she died subsequent to that marriage nor has Mrs. Frazier presented us with any such evidence. If evidence can be presented to show that Judi James was not married to the member on the date of his death, then consideration of the children's claim may be given on that basis. If, however, the evidence provided relates to the death of Judi James, then such claim as Mrs. Frazier may have under 10 U.S.C. 1477 is subject to the provisions of the barring act. That act, which is presently codified as 31 U.S.C. 71a (Supp. V, 1975), provides in pertinent part:

"(1) Every claim or demand * * * against the United States cognizable by the General Accounting Office * * * shall be forever barred unless such claim * * * shall be received in said office within 6 years after the date such claim first accrued * * *."

Mrs. James' claim, as surviving spouse, accrued on August 17, 1959. No claim has been received from her prior to August 17, 1975, the sixth anniversary of the member's death; therefore, if Judi James is alive today, her claim is forever barred. Mrs. Frazier's claim on behalf of the deceased member's children could accrue only as a successor to Mrs. James' interest upon her death, there being no right to payment to the children if Mrs. James was his widow and remains alive. Therefore, if evidence is presented that Judi James died prior to August 17, 1975 (the date her right to claim was extinguished), then this Office could give further consideration to Mrs. Frazier's claim.

Accordingly, in the absence of such evidence, there is no legal basis upon which Mrs. Frazier's

B-187581

claim may be allowed and the action taken by our
Claims Division is sustained.

Deputy

W. H. K. H.
Comptroller General
of the United States